IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

WEDNESDAY, THE 13TH JUNE 2007 / 23RD JYAISHTA 1929

SA.No. 823 of 1993(F)

(AGAINST THE JUDGMENT IN AS.60/1987 ON THE FILE OF THE SUBORDINATE JUDGE, TIRUR FROM OS.171/1973 of MUNSIFF COURT, TIRUR)

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APPELLANT: APPELLANTS/PLAINTIFFS:

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1. **VALIYAVEETTILL AYYAPPAN, S/O.THOMAS, ATED 53 YEARS, NADUVATTOM, TIRUR.**

2. **MADHAVI, D/O.ARUMUGHAN, AGED 38, RESIDING....DO.....**

3. **DASAN, AGED 29 YEARS, RESIDING .....DO...DO....**

*4. **CHATHANGATTIL CHAKKI, W/O.ARUMUGHAN, RESIDING ....DO..... (D I E D).**

*** R14 TO R17, SUPPLEMANTAL R18 TO R20 AND APPELLANT NOS.2 & 3 ARE RECORDED AS THE LEGAL REPRESENTATIVES OF DECEASED 4TH APPELLANT VIDE ORDER DTD. 6/07/04 IN I.A.1275/04.**

5. **KADHALIYIL KOCHI, W/O.ARUMUGHAN, ...DO...**

BY ADV. SRI.T.A.RAMADASAN
SRI. A.K.ALEX,
SRI.K.ABOOTY

...2/-

RESPONDENTS: RESPONDENTS:DEFENDANTS:

%%1. MACHINCHERIL THOOMBIL ALIAS VALIYAKANDATHIL POCKER, S/O.KUNHAMMED, AGED 48 YEARS, KALPAKANCHERY AMSOM. (D I E D).

2. KARIMBINKANDATHIL MAMMI, S/O.MOIDEEN, RESIDING AT KALPAKANCHERY AMSOM.

3. MACHINCHERIL THOOMBIL KUNHAMMED, S/O.KUNHAMMED, RESIDING ...DO....

4. MACHINCHERIL THOOMBIL AHAMMED, RESIDING ....DO.....

++5. MACHINCHERIL ANTHU, S/O.AVULAN, VALAVANNI AMSOM. (D I E D).

6. PATHUMMAKKUTTY, D/O.MOHAMMED, RESIDING ...DO....

7. ##SAIDALIKUTTY, S/O. VEERANKUTTY, KALPAKANCHERY AMSOM AND DESOM (CORRECTED)

8. THITHURUMMA, AGED 34,.....DO.....

9. NABEESA UMMA, AGED 32, ...DO....

10. MOHAMMED, AGED 30, RESIDING ....DO.....

11. USMAN, AGED 28 YEARS, ...DO.....

12. PATHUMMA, AGED 26 YEARS, ...DO.....

@13.KUMARAN, AGED 43, RESIDING.....DO.....

14. RARU, AGED 41 YEARS, ...DO.....

15. VALIYAVEETTIL SUBRAMANIAN, S.O.ARUMUGHAN, RESIDING ....DO....

16. VASU, AGED 34 YEARS, NADUVATTOM, TIRUR.

17. KRISHNAN, AGED 32 YEARS, RESIDING ...DO.....

...3/-

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@ ADDL.R18 TO R20 ARE IMPLEADED:

R18. V.V.CHAKKY,
KOOTHANDIKOVIL HOUSE,
BIGGARANELLUR, COIMBATORE.

R19. VALSALA,
RESIDING .....DO.....

R20. JAYAKRISHNAN,
S/O.LATE KUMARAN,
RESIDING ....DO.....

(LRS OF THE DECEASED R13 ARE IMPLEADED AS ADDL.RESPONDENTS 18 TO 20 VIDE ORDER DTD. 21/07/04 IN C.M.P.NO.208/98.)

BEERANKUTTY,
S/O.SAIDALIKUTTY,
PALLIMALIL HOUSE,
P.O. KALPAKANCHERRY, VIA.TIRUR,
MALAPPURAM DISTRICT.

(THE ADDRESS OF R7 IS CORRECTED AS PER ORDAER DTD. 8/06/05 IN I.A.981/05)

%% SUPPLEMENTAL R21: SAINABA (WIFE)
R22: MUHAMMED (SON)
R23: KUNHI MOYHAMMED (SON)
R24: SAINUDHEEN (SON)
R25. UMMUKULUSU (DAUGHTER)

ALL RE RESIDING AT MECHINCHERI THOOMPIL HOUSE, VALIYAKUNNU AMSOM DESOM, VALIYAKUNNU P.O., MALAPPURAM DISTRICT.

SUPPLEMENTAL RESPONDENTS 21 TO 25 ARE IMPLEADED AS THE LR'S OF THE DECEASED 1ST RESPONDENT VIDE ORDER DTD. 23/02/2006 IN I.A.1257/04.

...4/-

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++ a) SUPPL.R26: KUNHIYESUMMA (WIFE)
R27: KUNHAMMED (SON)
R28: ABDULLA (SON)
R29: HAMSA (SON)
R30: MOIDEEN (SON)
R31: NABEESA (DAUGHTER)
R32: FATHMA (DAUGHTER)
R33: AMINA (DAUGHTER)

ALL ARE RESIDING AT MECHINCHERIL HOUSE,
KALPAKANCHERRY P.O., TIRUR TALUK, MALAPPURAM DISTRICT.

SUPPLEMENTAL RESPONDENTS 26 TO 33 ARE IMPLEADED
AS THE LEGAL HEIRS OF THE DECEASED 5TH RESPONDENT
VIDE ORDER DTD. 2/02/06 IN I.A.1273/2004.

BY ADV. SRI.T.KRISHNANUNNI for Addl.R26, 31,32 & 33
SRI. P.K.ANIL for R13, 14, 15 & 17

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD
ON 13/06/2007 , THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

M.SASIDHARAN NAMBIAR,J.

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S.A. NO. 823 OF 1993

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Dated this the 12th day of June, 2007

JUDGMENT

Plaintiffs in O.S.171/1972 on the file of Munsiff Court, Tirur are the appellants. Respondents 1 to 14 are the defendants. On the death of first respondent, respondents 21 to 25 were impleaded as the legal heirs. On the death of 5th respondent, respondents 26 to 33 were impleaded and on the death of 13th respondent, respondents 18 to 20 were impleaded. On the death of 4th appellant, appellants 2 and 3 were recorded and respondents 14 to 17 were impleaded as legal heirs. Appellants instituted the suit seeking a decree for recovery of possession. Plaint schedule property is 1 acre 31 cents in R.S.No.266/1 of Kalpakanchery Village. Plaint schedule property admittedly originally belonged in jenm to Ayavanthram devaswom. Appellants would contend that plaint schedule property along with four other properties

were obtained by Palliyalil Kammu on kanom right which was assigned by his son Moidu in favour of Veerankutty under Ext.A1 assignment deed dated 13.3.1893 and after the death of Veerankutty, his son 7th respondent under Ext.A2 assignment deed sold that property in favour of Arumughan and Ayyappan and on their death , it devolved on the appellants as their legal heirs and thus the plaint schedule property belong to them and they have been in possession of the said property. It was contended that while so, defendants 1 to 4 attempted to trespass into the plaint schedule property and appellants then lodged a complaint before Kalpakanchery Police and executive Magistrate, Malappuram initiated proceedings under section 145 of the Code of Criminal Procedure in M.C.20/1969 and took custody of the property and entrusted it to the Village Officer and thereafter the matter was referred to the civil court for a finding regarding possession and the court in R.C.1/1969

found possession of the property with defendants 1 to 4. After Section 145 proceedings was dropped possession was handed over to them. It was contended that respondents obtained possession only thereafter and the document alleged to have been executed in favour of the second defendant is only a sham document fraudulently created in collusion with defendants 1, 3 and 4 and second defendant is the brother in law of the first defendant and third defendant is the paternal uncle of first defendant. Defendants 3 to 6 were impleaded alleging that defendants 1 to 4 have created documents in their favour. Appellants contended that they are entitled to a decree for recovery of possession on the strength of title. Only defendants 5 and 6 contested the suit. 5th defendant in his written statement contended that plaint schedule property which belong to the Ayavanthram Devaswom was in the possession of first defendant as per kanom assignment deed 1902

of 1964(Ext.B3) and subsequently 5th defendant purchased the property from the first defendant under Ext.B1 assignment deed and this property was not included in the proceedings initiated under section 145 of the Code of Crl.Procedure and defendants have not created any fraudulent document as alleged. In the additional written statement, 5th defendant contended that Kammu had not made any assignment in 1893 as alleged and Ext.A1 was executed by Moidu, the son of Kammu in respect of some properties included in 1893 document but the lease was not renewed and Kalluvalappu paramba mentioned in Ext.A1 was not included in the kanacharth of 1906 and only item No.1 of Kalluvalappu paramba was included in the Kanacharth and Veerankutty assigned that property to Pallimalil Mootha as per document dated 29.7.1907 and children of Veerankutty did not obtain any right over kalluvalappu paramba and Ext.A2 executed by 7th defendant is without bonafides and the

assignment deed of 1906 was suppressed in that assignment deed and plaintiffs did not derive any right or title to the property. It was also contended that Veerankutty had a daughter by name Beema Umma apart from seventh defendant and appellants did not obtain any property and first defendant got assignment of the property from the legal heirs of Mootha as per Ext.B3 assignment deed and he has been in possession of the property on the strength of that document and not on the basis of the possession obtained from the Village Officer as alleged. It was also contended that appellants or their assignors had no right over any property in R.S.No.266/1 and fifth defendant is in possession of the property described in the written statement and there are many properties by name Kalluvalappu paramba in Kalpakanchery amsom and appellants are not entitled to the decree sought for. 6th defendant filed a written statement contending that he got assignment of the property

from Parappara Nadayambadi Ali Mohammed as per Ext.B2 assignment deed and the appellants or the other respondents have no right over the property. Learned Munsiff framed necessary issues. On the evidence of PW1, DW1, and Exts.A1 to A8, Exts.B1 to B15 and C1 and C2, learned Munsiff found that appellants did not establish their title to the plaint schedule property and therefore they are not entitled to the decree for recovery of possession sought for. Appellants challenged the decree and judgment before the Sub Court, Tirur in A.S.60/1987. First Appellate Court on reappreciation of evidence confirmed the findings of the learned Munsiff and dismissed the appeal. Though 5th defendant filed a Cross Objection, that was also dismissed. Challenging the dismissal of the appeal confirming the decree of the trial court, plaintiffs preferred the Second Appeal.

2. Second Appeal was admitted formulating the following substantial questions of law.

1) When appellants produced Exts.A1 and A2 title deeds and the revenue receipts, whether courts below were correct in holding that appellants did not establish title to the property?

2) Whether in the light of Ext.C1 report and Ext.C2 plan and without examining the Commissioner, it was proper for the courts to hold that plaint schedule property was not identified.?

(3) When Exts.A1 and A2 shows that plaint schedule property is item No.4 of the property covered under Ext.A1, whether the courts below were correct in holding that appellants have no title of the property.

3. Learned counsel appearing for appellants and respondents were heard.

4. The title set up by the appellants is under Exts.A1 and A2. Plaint schedule property admittedly originally belonged to Ayavanthram Devaswom. Ext.A1 establish that seven items of properties were obtained under kanom right by Kammu

as per registered kanom renewal deed 932/1872 and even earlier those properties were in his possession on kanom right. Item No.4 of the said properties is claimed to be the plaint schedule property. The description of that property is Kalluvalappu Oozhu paramba having two thaks measurements of 43x52 and 24x28 six feet koles. Under Ext.A2, rights over 4 items of properties including item No.4 was assigned by Moidu, the son of Kammu to his deceased brother's son Veerankutty. It was 7th defendant, the son of Veerankutty who assigned the rights under Ext.A2 obtained by him on the death of Veerankutty in favour of the plaintiffs. Plaintiffs would therefore claim title to the property under Ext.A2. Under Ext.A2 only portion of item No.4 and three other items of Ext.A1 properties was assigned. The portion of item 4 of Ext.A1 property assigned thereunder is described as Kalluvalappu Oozhuparambil thekku padinjarebagom paramba having

a measurement of 43x21 and 24x28 six ft.koles. Respondents would contend that after Ext.A1, Veerankutty had renewed the Kanom over Ext.A1 properties under Ext.B4 registered kanom deed 2650/1906 and thereafter Veerankutty in turn assigned his rights under document 887/1907 in favour of Mootha and Mootha in turn assigned that right in favour of the first defendant under Ext.B4. From Ext.B4 it does not show that kanom in respect of three of the seven items covered under Ext.A1 was renewed. Instead Ext.B4 only shows that kanom right in respect of the property described as Kalluvalappu paramba along with three other items were renewed. The measurements of that property so renewed are 43x25 and 24x28 6 ft.koles. The right transferred under Ext.B3 is the right obtained by Mootha from Veerankutty, which in turn is the right obtained under Ext.B4. Veerankutty had also assigned portions of the property under Ext.B5, whereunder also portions of

Kalluvalappu paramba was transferred. Learned Munsiff as well as learned Sub Judge on appreciation of the documents relied on by the parties held that though under Ext.A1 Kalluvalappu Paramba having a measurement of 45x52 and 24x28 was assigned in favour of Veerankutty, Ext.B4 shows that out of seven properties covered under Ext.A1, there was renewal of kanom only in respect of 45x25 and 24x25 six ft.koles measurements of Kalluvalappu paramba and three other items and that right was transferred to Mootha and thereafter under Ext.B3 it was obtained by first respondent and therefore when Ext.A2 assignment deed was executed by the seventh defendant as the son of Veerankutty, neither Veerankutty nor seventh respondent had that property with them and therefore appellants have no title to the property. The courts below also held that even if it is taken that Ext.B4 only takes in a portion of item No.4 of Ext.A1 property,

appellants did not identify the remaining property as the plaint schedule property and therefore they are not entitled to the decree for recovery of possession.

5. The arguments of the learned counsel appearing for appellants is that the name of item No.4 of Ext.A1 property is Kalluvalappu Oozhuparamba and Ext.B3 shows that the property assigned thereunder is cheriyaparambathe kizhakke paramba @ Kalluvalappu paramba and the measurements are also different and it is not proved that the property covered under Ext.B4 is the property obtained under Ext.A1 and therefore the findings of the courts below is unsustainable. It was also argued that in any event without proper identification of the property, courts below should not have dismissed the suit. Learned counsel argued that in such circumstance, if there is doubt with regard to the actual identity of the property and whether plaint schedule property is

the balance of the property left with Veerankutty out of the properties covered under Ext.A1 less the property renewed under Ext.B4, courts below should have directed the Commissioner to demarcate the property and as it was not done, the suit is to be remanded for fresh disposal after granting an opportunity to get the property identified. Learned counsel appearing for respondents argued that the trial court and the first appellate court elaborately considered the evidence and it was found that plaint schedule property was not identified and appellants have no title to the property and in such circumstance, no further opportunity is to be granted and there is no necessity to remand the suit.

6. When appellants seek a decree for recovery of possession on the strength of title, it is their burden to establish their title to the plaint schedule property. Neither the weakness of the defendants case nor their failure to prove their

title will enable the plaintiffs to get a decree. It is for the plaintiffs to establish the identity of the property and they cannot be heard to contend that defendants did not establish the identity and therefore they are entitled to get a decree.

7. Ext.A1 shows that seven items of properties were obtained as per kanom by Kammu and that right was transferred by his son to Veerankutty under Ext.A1. Item No.4 consists two thaks measuring 43x52 and 24x28 six ft.koles. Among the seven properties covered under Ext.A1 only item No.4 is Kalluvalappu Oozhuparamba which admittedly is the name of the plaint schedule property. Ext.B4 shows that out of the seven items covered under Ext.A1 kanom of 4 items were renewed. Item No.1 is Kalluvalappu paramba having two thaks namely 43x25 and 24x28. Therefore appellants cannot contend that Kalluvalappu paramba covered under Ext.B4 is not item No.4 of Ext.A1 properties. At best, it could be argued that because of the difference in

six ft. kole measurement portion of the property covered under Ext.B4, was left with the assignee under Ext.A1. Learned counsel appearing for the respondents argued that when Ext.B4 shows that kanom was not renewed in respect of all the items of properties unless there is evidence to prove that kanom in respect of other properties including portion of item No.4 excluding the portion under Ext.B4 are also renewed, plaintiffs cannot claim title to the property. Learned counsel appearing for appellants argued that even if it is taken that kanom in respect of the remaining portion of item No.4 of Ext.A1 property was not renewed, the legal position is that the kanom right continued with Kammu and so long as kanom is not redeemed, Kammu has title over the property. As rightly pointed out by learned counsel appearing for respondents , appellants have no such case before the courts below that plaint schedule property is the portion of the

property left with Kammu out of Ext.A1 properties after Ext.B4 renewal. On the other hand, Ext.A1 assignment deed was executed and the suit was instituted as if the entire rights over seven items of property obtained under kanom right from Ayavanthram Devaswom which available with Kammu and it was transferred to Veerankutty and thereafter the right over item No.4 of the plaint schedule property was assigned under Ext.A2 by 7th defendant, the son of Veerankutty in favour of the plaintiffs and they have title to the property. There is no case that plaint schedule property which was transferred under Ext.A2 was the property left with Veerankutty, which was covered under Ext.A1 but was not renewed under Ext.B4 and remained with either Kammu or Veerankutty. Whatever it be, when Ext.B4 shows that kanom right over the paramba by name Kalluvalappu paramba is renewed and it is item No.4 of Ext.A1, it establish that kanom right renewed was including the right

over item No.4 Kalluvalappu paramba. It is thus absolutely clear that the renewal of kanom is in respect of item No.4 of the property covered under Ext.A1 also. At best, appellants can only argue that the said renewal will not take the entire item No.4 and a portion was left out. Even if that be the case, it is up to the appellants to plead and prove that plaint schedule property is the remaining extent so left with Veerankutty.

8. The appellants have to establish the identity of the plaint schedule property as the remaining portion of the property left under Ext.A1.

9. When item No.4 of Ext.A1 property takes in two thaks with measurement 45x52 and 24x28, six feeet koles plaint schedule property is Kalluvalappu Oozhuparamba south western portion with measurements 43x21 and 24x28. From Exts.A1 and B4, it is absolutely clear that Ext.B4 takes the entire thak No.2. Therefore even if the argument

of the learned counsel appearing for appellants is to be accepted, thak No.2 of plaint schedule property was not left with Kammu or Veerankutty. Therefore appellants cannot claim any title to that portion of the plaint schedule property under Ext.A2 assignment deed as much earlier the kanom was renewed and Veerankutty had assigned that property in favour of Mootha who in turn assigned it in favour of first defendant under Ext.B3. What remains is only thak No.1. Even if it could be argued that after the renewal under Ext.B4, a portion of Kalluvalappu Oozhuparamba having a measurement of 45x27 six feet is left with Veerankutty, unless it is established that it is the plaint schedule property, appellants are not entitled to the decree sought for. First of all, appellants had no such case before the trial court. Secondly, evidence do not establish that the plaint schedule property is the property left with either Kammu or Veerankutty.Ext.A1 and A2 therefore

does not establish the title of appellants to the plaint schedule property. Exts.C1 and C2 do not establish that plaint schedule property is the portion of item No.4 of Ext.A1 properties excluding the property covered under Ext.B4. In such circumstances, both the courts rightly found that appellants did not establish their title to the plaint schedule property and therefore they are not entitled to the decree for recovery of possession sought for.

The appeal is dismissed.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

S.A.NO. 823/1993

JUDGMENT

12th June, 2007

M.SASIDHARAN NAMBIAR, J.

W.P.(C).NO. /06

JUDGMENT

SEPTEMBER,2006